BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN KEVIN RANDEL	)	
Claimant	)	
	)	
VS.	)	
	)	
LEROY PERRY d/b/a PERRY CONST.	)	
Uninsured Respondent	)	Docket No. **251,165**
	)	
AND/OR	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

The Workers Compensation Fund requests review of the November 14, 2007 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on February 5, 2008.

APPEARANCES

Gary M. Peterson of Topeka, Kansas, appeared for the claimant. John A. Bausch of Topeka, Kansas, appeared for the Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the Fund agreed that the parties are covered by the Workers Compensation Act and that it did not dispute the nature and extent of claimant's disability as determined by the Administrative Law Judge (ALJ). The parties, by stipulation filed November 6, 2007, agreed Dr. Robert L. Eyster's report is part of the evidentiary record.

ISSUES

The ALJ found claimant sustained a 30 percent right lower extremity impairment and a 23 percent left lower extremity impairment. The ALJ further found respondent, a sole proprietor, was insolvent and ordered the claimant's benefits to be paid by the Fund. The

ALJ also determined that although the Fund argued in its submission brief that the claim was barred by K.S.A. 59-2239, nonetheless, the Fund had failed to raise that defense at regular hearing and was not permitted to raise the issue after the evidentiary record had closed.

The Fund requested review and at oral argument before the Board raised the following issues: (1) whether the claimant's claim is barred by K.S.A. 44-523(f); (2) whether claimant's claim is barred by the provisions of K.S.A. 2004 Supp. 59-2239 (non-claim statute) and claimant's failure to file a claim in probate court to obtain a determination that the respondent's estate was insolvent; (3) whether claimant established respondent's insolvency pursuant to K.S.A. 44-532a; and (4) whether the ALJ erred in his calculation of the award because he failed to deduct the weeks of temporary total disability compensation paid as required by K.A.R. 51-7-8.[1]

Claimant argues the Fund did not raise K.S.A. 2004 Supp. 59-2239 as an issue at the regular hearing and the Board does not have jurisdiction to review an issue not raised before the ALJ. The claimant concludes the ALJ's Award should otherwise be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was injured on October 25, 1999, when he fell from a ladder while working for the respondent. He suffered a comminuted left calcaneal fracture and a right distal tibial pilon fracture. Surgeries were performed to correct the injuries.

The respondent Leroy A. Perry, a self-employed contractor doing business as Perry Construction Company, denied that claimant was an employee on the date of accident. Respondent did not have workers compensation insurance coverage on the date of claimant's accident.[2] On July 7, 2000, claimant impleaded the Fund pursuant to K.S.A. 44-532a because respondent did not have workers compensation insurance on the accident date and claimant was concerned about its ability to pay benefits.

[1] In its application for review the Fund raised additional issues but at oral argument before the Board the Fund agreed the parties were covered by the Act and that it did not dispute the ALJ's determination regarding the percentages of permanent impairment.

[2] Stipulation filed October 25, 2006.

A preliminary hearing was held and the ALJ determined claimant was respondent's employee and ordered respondent to pay claimant temporary total disability compensation and provide medical treatment. The ALJ further determined that respondent's insolvency had not been established. The Board affirmed this decision on appeal. The respondent paid claimant temporary total disability compensation in the amount of $3,895 and paid medical expenses for claimant in the amount of $5,042.14.

The respondent Leroy A. Perry died on March 30, 2002. The claimant and Fund stipulated that the only probate proceeding filed in the Matter of the Estate of Leroy A. Perry was a Petition for Determination of Descent filed in Marshall County. A Decree of Descent was entered on January 3, 2003, transferring title to Mr. Perry's real estate to his widow and their four children.[3]

Claimant contends that it was not until April 20, 2006, that he was first provided notice from respondent's counsel that Leroy A. Perry had passed away on March 30, 2002. Respondent's attorney, Derek J. Shafer, filed a Motion for Dismissal/Withdrawal on April 20, 2006. Claimant's attorney, Jeff K. Cooper, filed a Motion to Substitute on June 14, 2006, requesting the ALJ to substitute the estate of Leroy A. Perry as the respondent. The Fund objected to claimant's request to substitute parties and requested that the claim be dismissed. On July 14, 2006, the ALJ issued an Order allowing respondent's counsel to withdraw.

After a telephone conference it was determined the claimant and Fund would file a stipulation of facts as well as briefs and the ALJ would rule on the motions. A stipulation was filed on October 25, 2006, outlining the pertinent facts with regards to the motions and both parties filed briefs regarding claimant's Motion to Substitute. The ALJ then entered an Order on January 19, 2007. The ALJ determined that K.S.A. 59-2239 was not applicable to this workers compensation claim, that claimant's request to substitute was moot and not a procedure recognized by the Act. Claimant was allowed to proceed against the Fund. On appeal, the Board determined it lacked jurisdiction because the ALJ's denial of the motion to dismiss was not a final order subject to review but that the Fund's request to dismiss could be reserved and reconsidered at final hearing.

The claim proceeded to final hearing and the ALJ awarded claimant benefits for a 30 percent scheduled disability to the right lower extremity and a 23 percent scheduled disability to the left lower extremity. The ALJ further determined that the Fund did not raise the defense of K.S.A. 59-2239 as a bar to the claim when asked at regular hearing what issues were in dispute. Consequently, the ALJ determined the issue could not be raised after the record was closed. The ALJ also determined that K.S.A. 44-523(f) did not require

[3] *Id*.

dismissal of the claim. And the ALJ further determined the respondent Leroy Perry was insolvent because the uninsured sole proprietor was deceased and the evidence established there were no assets. Accordingly, the Fund was ordered to pay claimant's compensation benefits.

Whether the claim is barred by K.S.A. 44-523(f).

Initially, the Fund argues the claim should be dismissed as the application for hearing was filed on January 18, 2000, but the case did not proceed to a full hearing within five years of that date. The regular hearing was held on October 4, 2007. Consequently, the Fund argues the case should be dismissed pursuant to K.S.A. 44-523(f). The ALJ found that the amendment to K.S.A. 2006 Supp. 44-523(f) involved a substantive right, does not have retroactive application and is not applicable to this case. The Board agrees.

The Kansas Legislature amended K.S.A. 44-523(f) effective July 1, 2006, to provide:

> Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

The general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively especially when the amendment to an existing statute creates a new liability not existing before or changes the substantive rights of the parties.[4] Moreover, it is an axiom of workers compensation law that the substantive rights between the parties are determined by the law in effect on the date of injury.[5]

The amendment to K.S.A. 2006 Supp. 44-523(f) does not express a clear intent that it is to operate retroactively and such an application of the statute could clearly affect

[4] *Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001).

[5] *Lyon v. Wilson,* 201 Kan. 768, 443 P.2d 314 (1968).

claimant's substantive rights.[6] The statutory amendment should be applied prospectively and accord all claims the same five-year period before they are subject to dismissal. Because the substantive rights of the parties to a workers compensation claim are determined by the law in effect on the date of injury the amendment to the statute applies to accidents that occur on or after its effective date. The Board affirms the ALJ's ruling.

Whether the claim is barred by K.S.A. 59-2239.

The Fund contends that the claim is barred by the provisions of K.S.A. 2004 Supp. 59-2239 (non-claim statute) because claimant failed to file a claim in probate court to obtain a determination that the respondent's estate was insolvent. Conversely, the claimant argues that the Fund, at regular hearing, did not raise the issue regarding the non-claim statute or the respondent's insolvency and, accordingly it waived those issues.

The primary argument raised on review by the Fund is that because claimant failed to institute probate proceedings and determine whether Mr. Perry's estate could have paid the claim he cannot now establish Mr. Perry's insolvency in order to require the Fund to pay the claim. After receiving a fact stipulation from the parties the ALJ ruled on this issue in an interlocutory order during the course of litigation of this case. The ALJ addressed the Fund's request to dismiss in a January 19, 2007 Order. The Judge held that the Kansas non-claim statute, K.S.A. 59-2239, is not applicable to the Workers Compensation Act. Moreover, the Judge found the Fund may have liability as Mr. Perry was uninsured at the time of the accident and his death is the equivalent of an employer who "cannot be located and required to pay . . ." as provided by K.S.A. 44-532a(a). The Fund appealed the Order and the Board dismissed the appeal because the decision was not an appealable final order. The Board noted that "The January 19, 2007 Order *in this context* is not a final order as the Fund's request to dismiss may be reserved and reconsidered at the time of final hearing and award."

At the regular hearing held on October 4, 2007, the ALJ conducted an inquiry on the record to determine what issues were in dispute. The following colloquy occurred with the Fund's attorney:

JUDGE BENEDICT: All right. Do you know ever [sic] any other issues, Mr. Bausch?

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[6] To be clear, the Board has concerns about the constitutionality of K.S.A. 44-523(f). This statute has no provisions for basic due process. There is no requirement that notice be given nor is there an opportunity to be heard. The statute seems only to serve as a means for respondents and insurance carriers to close their files on claims without a full and fair airing of the facts. It would seem that the purpose of the statute is to achieve some sort of dismissal docket. And if that is indeed the purpose then the Division should promulgate regulations that would meet the minimal requisites of due process in order to achieve the intended purpose of the statute.

> MR. BAUSCH: No, except, Your Honor, within this week I filed a motion to dismiss the provisions of 44-523 which would enact an amended or supplemented July 1, 2006. I think obviously the question there would be whether this is retroactive or prospective legislation and whether or not it's procedural and or substantive. The statute as the Court knows says that if no action has been taken after five years after the application for hearing is filed - -
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> JUDGE BENEDICT: Well that issue has already come up before me in front of another claim and I've ruled that it is prospective only and the Board held that as prospective. So this is actually - - if you're going to make that argument, you're probably going to have to go up the Court of Appeals.
>
> MR. BAUSCH: I'll have to review that, Judge.
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> JUDGE BENEDICT: Other than that, do you know of any other issues, Mr. Bausch?
>
> MR. BAUSCH: None that I know of.[7]

The ALJ then established terminal dates for the introduction of evidence. The Fund's terminal date was set for November 4, 2007. The ALJ's Award contained the following finding:

> In its brief the respondent argues this claim is barred by the K.S.A. 59-2239 non-claim statute. This issue was not raised at the pre-hearing settlement conference. When the Fund was specifically queried at the regular hearing regarding the issues to be decided, this possible defense was not raised. The respondent [Fund] is not permitted to raise it now that the evidentiary record has been closed. Similarly, the respondent's belated attempt to argue that K.S.A. 44-532(a) does not allow a claimant to proceed directly against the Fund is not timely.
>
> K.S.A. 44-555c(a) states in part:
>
> There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. **The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge**. (Emphasis added)

The statute mandates that the Board's consideration be on issues presented to the ALJ. Issues not raised before the ALJ cannot be raised for the first time on appeal. To hold otherwise would place the Board in the position of attempting to decide an issue based

[7] R.H. Trans. at 8-9.

upon an incomplete record and would deny claimant the benefit of evidence that may have been presented if he had been aware that there was a dispute as to such issue.[8]

A review of the regular hearing transcript fails to find this issue was presented to the ALJ. The Fund's defense, based upon the non-claims statute, was not raised at the regular hearing. No request was made by the Fund to the ALJ to withdraw its stipulations and its submission brief to the ALJ, which raised the issue, was filed after its terminal date for submission of evidence had expired. As the issue was neither raised before the ALJ nor determined by the ALJ, the Board has no jurisdiction to consider the issue as a matter of first impression. Accordingly, the Board finds that the only issues preserved for the Board's review are those listed in the ALJ's Award.

Whether the Fund is liable for payment of compensation.

If the Kansas Workers Compensation Act (Act) applies, which it does in this case, the employer is liable to pay compensation to the employee.[9] The employer is required to secure the payment of compensation to its employees by either insuring the payment through an insurance carrier, or by qualifying as a self-insured or by securing a membership in a qualified group-funded workers compensation pool.[10]

But if the employer has no insurance to secure the payment of compensation, and the employer is financially unable to pay the compensation, the injured worker may apply to the director for the compensation benefits to be paid by the workers compensation fund.[11] And it is not the claimant's burden to prove the employer is uninsured or otherwise unable to pay the owed compensation benefits.[12]

The ALJ analyzed the evidence in the following fashion:

> As the uninsured sole proprietor is now deceased, and the evidence clearly indicates there are no assets upon which a claim can be made, the Court finds the respondent Leroy Perry is insolvent, and all benefits shall be paid by the Kansas Workers Compensation Fund.

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[8] See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

[9] *See* K.S.A. 44-501(a).

[10] *See* K.S.A. 44-532(b).

[11] *See* K.S.A. 44-532a(a).

[12] *See Helms v. Pendergast*, 21 Kan. App. 2d 303, Syl. ¶ 5, 899 P.2d 501 (1995).

The Board agrees and affirms. Moreover, Mr. Perry testified regarding his assets and provided an opinion regarding the value of the tracts of land he had an interest in or owned. Although he was able to pay claimant's temporary total disability compensation and medical treatment while he was alive and working, his testimony regarding the meager value of the tracts plus the fact that he is deceased establish that he would not only be unable to pay this claim but also cannot be located and required to pay the claim.

Whether the ALJ correctly calculated the scheduled disability awards.

The respondent paid claimant 20.86 weeks of temporary total disability compensation. The ALJ awarded those weeks in addition to the number of weeks for each scheduled disability. The Fund notes that K.A.R. 51-7-8 requires the number of weeks paid for temporary total disability compensation to be deducted from the number of weeks allowed for the loss of use of the scheduled member in the calculation of benefits. Conversely, claimant argues that K.S.A. 44-510d does not provide for the deduction of the weeks paid for temporary total disability compensation and the regulation contravenes the statute and should be declared void.

At issue is whether the weeks of temporary total disability benefits paid are to be deducted from the number of weeks provided in the schedule of K.S.A. 44-510d when computing the weeks of permanent partial disability benefits an injured worker is entitled to receive for an injury listed in the schedule of K.S.A. 44-510d.

K.A.R. 51-7-8 provides that the number of weeks paid for temporary total disability are deducted from the number of weeks allowed for loss of use of the scheduled member before that number is multiplied by the percentage of disability. Claimant argues that K.A.R. 51-7-8 is void because it conflicts with K.S.A. 44-510d. Claimant further argues that K.S.A. 44-510d specifically provides for an award of permanent partial disability after the period of temporary total disability without direction to deduct the weeks paid for temporary total disability compensation. Consequently, claimant requests the Board to determine the regulation is void as it violates the statute.

Claimant points out that K.S.A. 44-510e provides for calculation of an award for a whole person permanent partial disability and specifically mandates deduction for temporary total disability compensation. Likewise, K.S.A. 44-510f(a)(1) provides that the maximum compensation paid for an award for permanent total disability includes any payments of temporary total disability compensation. But, K.S.A. 44-510d which provides for scheduled disabilities does not specifically mandate deduction of the temporary total disability compensation and instead simply states "compensation shall be paid for temporary total loss of use and as provided in the following schedule." K.S.A. 44-510d does not mandate deduction of the temporary total disability compensation but instead

uses the conjunctive "and" to indicate compensation shall be paid for temporary total and then as provided in the schedule for the particular scheduled member.

The claimant's argument is compelling but the Board must first determine if it has jurisdiction to grant claimant the relief requested. Stated another way, can the Board determine that a duly promulgated regulation is void?

There is no question the Director of Workers Compensation may adopt the rules and regulations that are necessary for administering the Workers Compensation Act. The Act provides:

> The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. . . . All such rules and regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.[13]

And administrative regulations that are adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.[14] Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.[15]

Moreover, the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold that an Act of the Kansas Legislature is unconstitutional. Stated another way, the Board is not a court of proper jurisdiction to decide the constitutionality of laws in the State of Kansas. Because a regulation has the force and effect of law, such a regulation is as binding on the administrative agency as if it was a statute enacted by the legislature. Consequently, the Board concludes that it does not have jurisdiction and authority to determine that a regulation is void.

The Board does have jurisdiction to interpret and apply both laws and regulations. K.S.A. 44-510d does not address how temporary total disability benefits figure into the computation of an award for a scheduled disability. Indeed, the Act is silent. Consequently, K.A.R. 51-7-8 was adopted and it provides:

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[13] K.S.A. 44-573.

[14] *See* K.S.A. 77-425; *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, Syl. ¶ 1, 592 P.2d 456 (1979); *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 1, 763 P.2d 317 (1988).

[15] *Vandever*, 243 Kan. 693, Syl. ¶ 2.

(a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.

(2) The weekly compensation rate for temporary total compensation shall be computed by multiplying .6667 times the worker's gross average weekly wage. This figure shall be subject to the statutory maximum set in K.S.A. 44-510c.

(b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made.

(1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:

(A) deduct the number of weeks of temporary total compensation from the schedule;

(B) multiply the difference by the percent of loss or use to the member; and

(C) multiply the result by the applicable weekly temporary total compensation rate.

(2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows:

(A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the number of weeks on the full schedule for that member;

(B) deduct the temporary total compensation; and

(C) multiply the remainder by the weekly temporary total compensation rate.

(3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.

(c)(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.

(2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.

(3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.

(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

(5) If the tip of a finger, thumb, or toe is amputated, the amputation does not go through the bone, and it is determined that a disability exists, the disability rating shall be based on a computation of a partial loss of use of the entire finger. (Authorized by K.S.A. 1996 Supp. 44-510d and K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510d; effective Jan. 1, 1966; amended Jan. 1, 1971; amended Jan. 1, 1973; amended, E-74-31, July 1, 1974; amended May 1, 1975; amended

Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended, T-88-20, July 1, 1987; amended May 1, 1988; amended May 22, 1998.)

Although the regulation is somewhat lacking in clarity, it does indicate that the weeks of temporary total disability benefits are to be deducted from the maximum number of weeks provided in the schedule before multiplying by the functional impairment rating to obtain the number of weeks of permanent disability benefits due the injured worker. Accordingly, until an appellate court determines that the regulation contradicts the statute and declares the regulation void, the Board will continue to apply K.A.R. 51-7-8 in the calculation of awards for scheduled injuries.

Consequently, claimant's award of permanent partial disability benefits must be computed after reducing the maximum weeks by the temporary total disability weeks. The parties stipulated the claimant received 20.86 weeks of temporary total disability compensation. But there was no indication whether the weeks paid were applicable to the right or left lower extremity injuries. Accordingly, the temporary total disability weeks will be split and 10.43 weeks will be deducted from the calculation of benefits for each scheduled injury to the lower leg.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 14, 2007, is modified to deduct paid temporary total disability compensation in the calculation of the awards and affirmed in all other respects.

Claimant is entitled to 10.43 weeks of temporary total disability compensation at the rate of $186.77 per week in the amount of $1,948.01 followed by 53.87 weeks of permanent partial disability compensation, at the rate of $186.77 per week, in the amount of $10,061.30 for a 30 percent loss of use of the right lower leg, making a total award of $12,009.31.

Claimant is entitled to 10.43 weeks of temporary total disability compensation at the rate of $186.77 per week in the amount of $1,948.01 followed by 41.30 weeks of permanent partial disability compensation, at the rate of $186.77 per week, in the amount

of $7,713.60 for a 23 percent loss of use of the left lower leg, making a total award of $9,661.61.

Both lower extremity impairments combine for $21,670.92 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 31st day of July 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned members disagree with the majority's determination that K.S.A. 44-523(f) is substantive and can only operate prospectively.

In *Owen Lumber Co.*[16], the Kansas Supreme Court stated:

> [W]hile the distinction between procedural, remedial, and substantive laws is an important part of the analysis and a distinction we continue to draw [citation omitted], our analysis does not end there. As stated by one commentator:

[16] *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 223, 73 P.3d 753 (2003) (citing *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 364-65, 892 P.2d 497 [1995] and quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 711-12 [1960]).

> '[T]his formulation of the rule [that the legislature may modify the remedies for the assertion or enforcement of a right], in addition to ignoring the other factors relevant in determining the constitutionality of a particular statute, is an oversimplification of the manner in which the [United States Supreme] Court weighs a statute's effect on previously acquired rights. The Court has recognized that the removal of all or a substantial part of the remedies for enforcing a private contract may have the same practical effect as an explicit denial of the right. Thus the relevant factor in determining the weight to be given to the extent to which a preexisting right is abrogated is not whether the statute abolishes rights or remedies, but rather the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction; the greater the alteration of these legal incidents, the weaker is the case for the constitutionality of the statute.'

Under certain circumstances, K.S.A. 2006 Supp. 44-523(f) could affect the substantive rights of a claimant if applied retroactively and, therefore, it is not a procedural amendment only. But in those cases where the five-year period had not expired by the time the statute took effect and, therefore, claimant had time to prosecute the claim, the statute's effect may not be procedural as to that claim and the amendment could be applied retroactively. Similarly, in cases where the five-year period had expired before the effective date of the statute, as in this case, claimant should be given a reasonable time to file an application for extension of time. That opportunity, however, does not need to be a full five years from the effective date of the statute.

The new subsection would affect a claimant's substantive rights if its dismissal provision was applied in a case where the time limit ran before the subsection became effective, thus "blindsiding" the claimant with a dismissal. Conversely, if the five-year period had not expired by the time the statute took effect the claimant may have time to proceed to final hearing or show good cause for an extension of time. Under such circumstances the claimant should have a reasonable opportunity to comply with the new subsection's procedural requirement before it is given retroactive application. The same reasoning would apply to a claim where the five-year period had elapsed before the statue became law. The test is what constitutes a reasonable time from the effective date of the amendment until the five-year period expires. In addition, there was also a period of time from the date the Legislature enacted the amendment to K.S.A. 44-523 until it became effective. This should also alert counsel to the need to prosecute a claim and be factored into the determination of what constitutes a reasonable time.

The date upon which K.S.A. 44-523(f) operates is not the date the application for hearing was filed, but five years after that date. The statute should not operate retroactively if it is applied to an application's "fifth anniversary" date that fell before the

statute became effective. But in those cases where the application's fifth anniversary falls after the effective date of the statute, the statute may be applied with retroactive effect where it is reasonable to do so. If a fifth anniversary fell after, but very near the statute's effective date, such that the claimant had no reasonable chance to comply, fairness may require some "grace period." Likewise, such a "grace period" should be judicially determined in this case.

The Legislature has the power to change the conditions by which an injured worker must maintain an action against an employer for workers compensation benefits. Furthermore, statutes of limitations have been held to be remedial and can be applied retrospectively. Accordingly, the statute need not be applied evenly and equally to all claims. All claims are not entitled to the same five-year period before they are subject to dismissal. Because the statute is remedial, it can operate retrospectively, to affect accidents that occurred before its effective date. Instead, the test is what constitutes a reasonable time after the enactment of K.S.A. 2006 Supp. 44-523(f) for the claimant to pursue her rights and either proceed to final hearing or obtain an extension from the ALJ. The statute should be applied to accidents that occurred before the effective date of the statute only where there has been a reasonable opportunity after the effective date of the statute to protect claimants' rights.

The effective date of the statute was July 1, 2006. The fifth anniversary of claimant's Application for Hearing occurred before that date. Thus, under the minority's view, it would only be reasonable to apply the statute retroactively in this case if claimant were given an opportunity to file an application for hearing or an application for extension within a reasonable period of time after July 1, 2006. Something less than the 15 months claimant allowed to pass between the effective date of the statute and the date of the regular hearing would be reasonable. Although a dismissal without notice is a troubling procedure, that is the procedure the Legislature has enacted and it should be applied in this case.

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BOARD MEMBER

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BOARD MEMBER

c: Gary M. Peterson, Attorney for Claimant
John A. Bausch, Attorney for Fund